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Supreme Court of the United States

OCTOBER TERM, 1956

No. 772

SIGNAL OIL AND GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered November 20, 1956. Said judgment affirmed an Opinion and Order of the Federal Power Commission issued November 28, 1955, under review by the Court of Appeals pursuant to Section 19(b) of the Natural Gas Act.

OPINIONS BELOW

The Federal Power Commission's Opinion No. 288 and Order issued November 28, 1955, granting a certificate of public convenience and necessity, and its

Order Denying Rehearing issued January 13, 1956, are unreported and are printed in the Joint Appendix at pages 433a-468a and 494a-499a.[1]

The Opinion of the Court of Appeals is reported at 238 F. (2d) 771, and is printed in Appendix A (pp. 1a-7a). The judgment of the Court of Appeals is unreported and is printed in Appendix B (pp. 7a-8a).

JURISDICTION

The judgment of the Court of Appeals, affirming the Opinion and Order of the Federal Power Commission, was entered November 20, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

Petitioner filed an application for a certificate of public convenience and necessity covering a sale of natural gas made by it and also filed the twenty-year contract for such sale of gas as an initial rate schedule. Both the certificate application and the rate schedule were properly filed with the Federal Power Commission in accordance with the latter's regulations under the Natural Gas Act governing such matters, and applicable to an "independent producer", a class of natural gas company to which petitioner belongs. At the conclusion of formal hearings held pursuant to Sections 7(c) and (e) of the Natural Gas Act, governing the grant or denial of certificates of public con-

[1] References marked Appendix A, B, and C are to the Appendices to this Petition; and "J. App." to the Joint Appendix of the Parties before the Court below.

venience and necessity, the Commission issued to petitioner a certificate upon condition that petitioner file with the Commission a new rate schedule providing for a specific rate different from and lower than the rate set forth in petitioner's initial rate filing. In so doing, the Commission failed to find that the rate so prescribed was the "just and reasonable" rate. Compliance with such condition would require petitioner to negotiate with the purchaser a new twenty-year contract providing for the lower rate specified by the Commission.

The questions presented are:

(1) Do the certificate provisions of Sections 7(c) and (e) of the Natural Gas Act authorize the Federal Power Commission to prescribe a rate for a natural gas company independently from and without adhering to the precise and explicit procedures and standards established by Congress in Section 5(a) of the Act which requires the Commission at the conclusion of a rate investigation to determine the just and reasonable rate and to fix the same by order?

(2) Has the Federal Power Commission deprived petitioner of its property without due process of law by prescribing arbitrarily a rate for petitioner different from and lower than the initial rate established in petitioner's gas sales contract without according to petitioner a fair and adequate hearing with respect to such rate as required by Section 5(a) of the Natural Gas Act and the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case arises under the Constitution of the United States and the Natural Gas Act, 52 Stat. 821-833 (1938), as amended 56 Stat. 83-84 (1942), 61 Stat. 459 (1947), 68 Stat. 36 (1954), 15 U.S.C. Sec. 717-717w (1952). The pertinent provision of the Constitution is the Fifth Amendment, the sections of the Act here pertinent are Sections 5a, 7(c) and (e), and the pertinent sections of the Commission's Regulations are Sections 154.92(b), 154.93, 154.101 and 157.23-27, which are printed in Appendix C (pp. 8a-16a).

STATEMENT

Petitioner owns and operates the Fox gasoline plant in Carter County, Oklahoma. Petitioner purchases casinghead gas, which is produced in association with crude oil from oil wells, from oil and gas producers in the immediate vicinity of this plant and moves such casinghead gas through a network of gathering lines to the plant for processing. In the processing operation, petitioner extracts natural gasoline, certain liquefiable hydrocarbons and impurities contained in the casinghead gas. The extraction operation leaves a remainder which is natural gas and is frequently called residue gas. (J. App. 9a-38a).

We are concerned here only with the residue gas which is sold by petitioner to Cities Service Gas Company[2] for ultimate transportation in interstate com-

[2] For convenience the following short titles will be used: Federal Power Commission—Commission; Cities Service Gas Company—Cities Service; Oklahoma Natural Gas Company—Oklahoma Natural; Lone Star Gas Company—Lone Star. Certificates of public convenience and necessity are sometimes referred to as "Certificates".

merce and resale under the provisions of a gas sales contract dated July 6; 1954 (J. App. 167a). This contract has a term of twenty (20) years; it provides for an initial price of twelve cents (12¢) per one thousand cubic feet (Mcf) of gas; and it contemplates initial deliveries of approximately 30,000 Mcf of residue gas per day at a required delivery pressure of 800 pounds per square inch gauge. Deliveries under this contract were commenced in the latter part of October 1954, pursuant to temporary authorization requested by and granted to petitioner and Cities Service on August 25, 1954, pending final action on their respective applications. (J. App. 228a, 229a).

To carry out the provisions of the gas sales contract Cities Service and petitioner filed, on August 24, 1954, separate but related applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. Petitioner, as an independent producer,[3] requested authorization to sell natural gas in interstate commerce to Cities Service for resale (J. App. 221a). Cities Service sought authorization to construct and operate certain pipeline and metering facilities, and to transport in interstate commerce the residue gas purchased from the Fox plant for its general system use and ultimate resale. On September 7, 1954, as required by Section 4 of the Act and the

[3] Section 154.91 of the Commission Regulation (18 CFR 154.91(a)) defines an "independent producer" as any person "who is engaged in the production and gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale but who is not primarily engaged in the operation of an interstate pipeline." It is a new class of natural gas company established by the Commission following this Court's decision, on June 7, 1954, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

Commission's regulations, petitioner also filed with the Commission the gas sales contract as petitioner's initial rate schedule (J. App. 317a).

On September 20, 1954, the Commission consolidated the certificate applications of Cities Service and petitioner for purposes of hearing and set October 28, 1954, as the date for the commencement of such hearing. This order of the Commission stated specifically that the hearing was being held pursuant to Section 7 of the Act. No provision was made in this order for an investigation of petitioner's initial rate under Section 5(a) of the Act (J. App. 246a).

The participants in the hearing were the two applicants, Counsel for the Staff of the Commission, nine municipalities served with gas from the Cities Service system,[4] acting as a group, and two gas-buying pipeline competitors of Cities Service which had attempted to purchase the residue gas output of the Fox plant, namely, Oklahoma Natural and Lone Star. The interveners sought to have the Commission either modify and reduce the price at which petitioner would sell gas to Cities Service, or deny petitioner's application for a certificate *in toto*.

At the hearing petitioner introduced testimony and evidence establishing that it had complied with the requirements of Section 7(e) of the Act. Petitioner also submitted in evidence its gas sales contract and testimony showing that such contract was the product

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[4] The Cities of Kansas City, Missouri; Kansas City, Kansas; Springfield, Missouri, and the Board of Public Utilities of Springfield; Joplin, Missouri; St. Joseph, Missouri; Leavenworth, Kansas; Atchison, Kansas; Carthage, Missouri; and Independence, Missouri. These municipalities did not participate in the proceedings before the Court of Appeals.

of arm's length bargaining (J. App. 17a). Petitioner's testimony and evidence was in complete accordance with the only substantive provision contained in the Commission's Regulations required to support a certificate application filed by an independent producer.[5]

Neither the municipalities nor Commission Staff Counsel offered any testimony or evidence. Oklahoma Natural and Lone Star offered rebuttal cases, but their evidence cannot fairly be said to have been designed or intended to enable the Commission to determine a just and reasonable rate for petitioner's sale of residue gas to Cities Service (J. App. 135a). Their cases consisted primarily of testimony and evidence showing that these two pipeline competitors of Cities Service were paying currently a price of ten (10) cents per Mcf for residue gas purchased under long term contracts from gasoline plants in Southern Oklahoma. Their evidence also showed that this price of ten (10) cents per Mcf was voluntarily established by them at the beginning of 1952, more than two years before petitioner's plant was built and placed in operation and would increase, pursuant to the terms of their contracts, at stated intervals subsequent to December 31, 1957. These interveners contended that failure to require petitioner to reduce its rate to ten cents (10¢) per Mcf might necessitate their having to pay higher prices for gas purchased by them. (J. App. 98a-141a).

The Commission's Findings and Opinion

On the basis of the evidence of record, the Commission unanimously held that the petitioner was a quali-

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[5] Section 157.25, Exhibit B, of the Commission's Regulations under the Natural Gas Act which is printed in Appendix C.

fied applicant for a certificate. It found, as required by Section 7(e) of the Act, that petitioner "is able and willing properly to do the acts and perform the service proposed" and that the proposed sale of residue gas to Cities Service is "required by the public convenience and necessity." (J. App. 454a).

In addition, a majority of the Commission found that "public convenience and necessity" required that the certificate issued to petitioner be conditioned upon the filing of a new rate schedule providing for a rate of ten (10) cents Mcf in lieu of the rate of twelve (12) cents Mcf provided in petitioner's gas sales contract. Chairman Kuykendall and Commissioner Digby dissented. They stated, in separate opinions, that they would grant petitioner a certificate without modification of petitioner's rate and questioned the propriety and legality of the majority's action (J. App. 456a-466a). In its opinion, after reciting what it believed to be the nature of the relationship of petitioner's rate to the self-established rate paid by Oklahoma Natural and Lone Star, the majority of the Commission said: "We wish clearly to state that in conditioning the order to follow to provide for a rate of ten (10) cents per Mcf, we do not find that this rate is the just and reasonable rate within the meaning of Section 4 of the Act * * *." "The ten (10) cent rate is not a definitive rate, and our action designedly is an interim measure calculated best to protect the public interest in a timely manner." (J. App. 451a). Additionally, the opinion of the majority held that a Section 5(a) hearing to investigate petitioner's rate for the purpose of determining a just and reasonable rate was too time consuming and administratively difficult. (J. App. 450a-451a).

Decision of the Court of Appeals

After the Commission issued its order denying rehearing,[6] a petition was filed with the Court of Appeals for review of the Commission's Opinion and Order pursuant to Section 19(b) of the Act. The Court of Appeals affirmed the Commission's order. In so doing, it did not discuss the relationship between the Commission's power to attach "reasonable terms and conditions" to the grant of a certificate under Section 7(e) of the Act and the Commission's power to investigate and modify initial rates only under Section 5(a) of the Act. The Court held that the Commission's power to impose "rate" conditions had already been upheld in several cases decided by the courts and that it failed to see the difference between the rate condition involved in this case and those in earlier cases which had been judicially approved. These cases are discussed at pages 15-17 herein. Moreover, the Court of Appeals' opinion does not indicate that it gave any consideration to petitioner's claim that it had been denied due process of law by the Commission.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This Case Involves an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

We are concerned here with defining the proper relationship between the certificate or "licensing" provisions of Sections 7(c) and (e) of the Act and the basic rate regulatory authority and duty of the Com-

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[6] Simultaneously with the filing of its Application for Rehearing (J. App. 469a), on December 16, 1955, petitioner also filed with the Commission a motion requesting a stay of the Commission Opinion No. 288 and order which motion was granted by order issued December 27, 1955 (J. App. 491a). This stay is still in effect.

mission under Section 5(a) of the Act. In this certificate proceeding the Commission has held that Section 7(e) authorizes it to modify and prescribe a rate for a natural gas company independently from, and without regard to, the limitations placed upon the exercise of its rate regulatory power under Section 5(a). The Commission claims as the source of this independent rate regulatory authority the provision in Section 7(e), which authorizes the Commission to "attach reasonable terms and conditions" to the grant of a certificate.[7]

This Court has never decided on its merits a case which dealt with the extent of the certificate authority of the Commission under Sections 7(c) and (e) or with a certificate issued by the Commission.[8]

The establishment of the proper relationship between the certificate and rate regulatory functions of the Commission is of substantial national importance.

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[7] Certificate conditions are discussed in the following cases: *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. (2d) 881 (C.A.D.C., 1948); *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission*, 203 F. (2d) 494 (C.A. 3, 1953); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. (2d) 467 (C.A. 3, 1956); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Public Utilities Commission of Connecticut* v. *Federal Power Commission*, 205 F. (2d) 116 (C.A. 3, 1953); *Cia Mexicana De Gas, S.A.* v. *Federal Power Commission*, 167 F. (2d) 804 (C.A. 5, 1948).

[8] Certiorari has been sought and denied in three cases decided by Courts of Appeal dealing with problems arising under Section 7. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. (2d) 729 (C.A. 3, 1955), *cert. denied*, 349 U.S. 945 (1955); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. (2d) 881 (C.A.D.C.), *cert. denied* 335 U.S. 854 (1948); and *Home Gas Company et al.* v. *Federal Power Commission*, 231 F. (2d) 253, *cert. denied* 352 U.S. 831 (1956).

Rate regulation involves an invasion of the property rights of the person affected. Consistent with the constitutional prohibition against an unlawful taking of property, Congress, in the Natural Gas Act, has carefully spelled out both the procedural mechanics and the substantive criteria which must be observed by the Commission in modifying and prescribing the rate of a natural gas company. Thus Congress, in Section 5(a), has directed the Commission first, after hearing, to find and determine the just and reasonable rate and then to fix the same by order. On the other hand, the certificate provisions of Sections 7(c) and (e) are not related to any vested or property right of an applicant but instead involve an exercise of discretion by the Commission concerning the ability and willingness of the applicant to perform, as well as matters of public policy and public interest. The record developed in a certificate proceeding is not intended to serve as a basis for determining and prescribing a rate. And in this case, the Commission has expressly failed to find that the rate prescribed for petitioner is the "just and reasonable" rate as required by Section 5(a).

The present certificate provisions of Sections 7(c) and (e) were added to the Natural Gas Act in 1942 and were designed primarily to give the Commission a separate and distinct regulatory jurisdiction over certain then unregulated construction and extension of natural gas pipelines.[9] The power of the Commission under Section 7(e) to attach "reasonable terms and conditions" to certificates was intended as no more than a supplement to the Commission's authority to

[9] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., pp. 81-2 (1941).

issue or deny certificates. It cannot properly be construed as vesting in the Commission an entirely separate rate regulatory power and authority which may be exercised independently from the basic rate regulatory authority of the Commission under Section 5(a). *Cf. United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

A harmonious interpretation of the certificate provisions of Sections 7(c) and (e) with the rate regulatory provisions of Section 5(a) requires that the "conditioning" power of the Commission be construed, so far as rate regulation is concerned, as a means of implementing and augmenting, rather than supplanting, the explicit grant of rate regulatory authority in Section 5(a). Such an interpretation would eliminate the possibility of conflict between these two separate and distinct regulatory functions of the Commission and would be in accord with this Court's decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949), where the Court said:

> "If possible all sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."

The legislative history of the 1942 amendment[10] indi-

[10] House Report No. 1290, 77th Cong., pp. 2-3. In respect to rate conditions, the House Interstate and Foreign Commerce Committee referred specifically only to a rate condition in the certificate granted to Louisiana-Nevada Transit Company in Docket No. G-122, 2 FPC 546 (1939), affirmed *sub nom. Arkansas Louisiana Gas*

cates that the Congress intended that the Commission, could, in its discretion, scrutinize the characteristics of the rate structure of an interstate gas pipeline certificate applicant in passing upon its certificate application. But the power to scrutinize is not equivalent to the power to modify and fix rates. The total absence of even the word "rates" from Sections 7(c) and (e) is significant in this regard.

Nor has the Commission in the past construed Section 7(e) as giving it a separate and distinct rate regulatory authority independent of that contained in Section 5(a). For example, in the Commission's 1949 Annual Report to Congress, at page 114, the Commission practice in regard to the extent rates are considered in certificate proceedings is explained as follows:

> "The rate proposals in connection with new pipelines and services must be carefully analyzed to ascertain whether the statutory requirements of reasonableness and nondiscrimination are met.
>
> "* * * Any evident departures from the statutory requirements and established practices with respect to rates requires conditioning any certificate granted *so that compliance with the rate provisions of the law may be effected.*" (Emphasis Supplied)

Thus the Commission itself has clearly recognized the limitations surrounding the exercise of its power under the certificate provisions of Sections 7(c) and (e), and that it, as well as the natural gas companies

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Co. v. *Federal Power Commission*, 113 F. (2d) 281 (C.A. 5, 1940). That rate condition held the applicant to the precise rate proposed in its certificate application but did not modify or reduce that rate.

subject to its jurisdiction, has the duty to comply with the rate regulatory provisions of Section 5(a) of the Act.

Moreover, in the innumerable certificates issued by the Commission since the 1942 amendment to the Natural Gas Act, petitioner has been unable to find a case in which the Commission has prescribed, in a rate condition, a specific rate lower than that proposed by the certificate applicant for the service sought to be authorized under the certificate. To the contrary, modification or lowering of a rate proposed to be charged for the service sought to be authorized under a certificate has been accomplished only after the Commission has invoked and complied with the provisions of Section 5(a) or has informally obtained the applicant's acquiescence thereto. In the instant case the Commission has not acted consistent with its past practice.

The instant case was the first formal contested certificate proceeding involving an independent producer scheduled for hearing by the Commission. To the best of petitioner's knowledge, the Commission has not, in the hundreds of certificate proceedings involving independent producers since the instant case, issued a certificate to any independent producer on condition that the independent producer applicant file a specific lower rate than that initially established in his gas sales contract.

Careful and reasoned analysis of what has actually been the Commission's practice makes it clear that the Commission has not used the power conferred by Section 7(e) of the Act to accomplish the objectives obtainable only by observance of both the procedural

and substantive requirements of Section 5(a).[11] Acceptance of the thesis enunciated by the Court of Appeals (Appendix A, p. 5a) that "interpretation of its authority by the Commission through the years must be given considerable weight" when tested against what has been the actual practice of the Commission will confirm that the Commission has treated petitioner differently than it has treated all other certificate applicants in that in the instant case the Commission is attempting to accomplish under the guise of the certificating power contained in Section 7(e) what can only properly be obtained by observance of the requirements of Section 5(a).[12]

In reviewing the judicial decisions which it indicated were decisive of the issues in this case, the Court of Appeals ignored the fact that the rate condition being reviewed in such other decisions did not *per se* effect a reduction or modification of a rate but instead served only to hold open the question of rates until such time as the Commission itself could comply with

[11] *Cf.* The Commission's 1952 Annual Report to Congress, pages 110-111. An example of a case in which the Commission conditioned a certificate by requiring the filing of "a definite and specific rate" is discussed in footnote 13 *infra*. The other three types of rate conditions referred to in this Annual Report do not involve a modification, let alone a lowering, of rates.

[12] It is difficult to understand the significance of the reference by the Court of Appeals to the fact that the Natural Gas Act was amended in 1954 (See App. A, p. 6a). That amendment added Section 1(c) to the Act. 68 Stat. 36 (1954), 15 U.S.C. 717(c). Certainly, when Congress amended Section 1 of the Act, the fact that it did not also amend Section 7 expressly to repudiate the Commission's own interpretation of its powers under Section 7, cannot validly be urged as an argument in support of the contention that the conditioning power of Section 7(e) supplants the rate regulatory authority contained in Section 5(a).

the rate regulatory provisions of the Act. Thus in *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission,* 203 F. (2d) 494 (C.A. 3, 1953) and *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 232 F. (2d) 467 (C.A. 3, 1956), final certificates were issued to the respective applicants on condition that each applicant file "a tariff satisfactory to the Commission at least six months prior to the commencement of operation". It is clear that this type of rate condition does not *per se* either modify a rate or require that any particular rate be filed. Approval by the courts of the rate conditions involved in such cases is not authority for the imposition of the type of rate condition involved in this case. The Commission did not attempt to modify the tariffs filed by the respective certificate applicants in those cases, until after the Commission had first invoked and complied with the provisions of Section 5(a) of the Act.[13] Such compliance consisted of

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[13] Thus as respects *Alabama-Tennessee,* paragraph B of the Commission's order issued December 27, 1951, giving notice of the rate hearing provides in pertinent part as follows: "(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 5, 7 and 15 of the Natural Gas Act, and pursuant to the conditions of paragraph B of the Commission's order issued herein on July 2, 1948 and June 16, 1950, a public hearing be held commencing on January 14, 1952 to determine the just, reasonable, non-preferential or non-discriminatory rate, charge, classification, rate regulation, service, practice or contract to be thereafter observed and in force by Alabama-Tennessee for sales of natural gas for resale in interstate commerce and to fix the same by order." This order is reported at 10 F.P.C. 1638-1640 (1951).

Likewise as regards *Panhandle Eastern,* paragraph (B) of the Commission's order issued July 11, 1950 giving notice of the rate hearing provides in pertinent part: "(B) Pursuant to the provisions of Sections 3, 4, 5, 7 and 15 of the Natural Gas Act, as amended, and in accordance with the terms of this Order a public

holding a rate hearing, determining the just and reasonable rate, and finally, fixing the same by order. Both the rate hearing and the determination of the just and reasonable rate by the Commission took place many months after the final certificates had been issued to the applicants there involved. It is also worthy of note that the appeals in those cases were taken from the orders issued at the conclusion of the rate hearings and not from the orders granting the

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hearing be held commencing August 14, 1950 with respect to the matters involved and the issues which by this order have been consolidated for hearing". Preceding portions of the order listed nine separate issues to be considered. Five of the issues concerned the establishment of "just and reasonable rates" and the form of Panhandle Eastern's tariff. This order is reported at 9 F.P.C. 924-931 (1950).

The Court of Appeals mentions *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. (2d) 881 (C.A.D.C. 1948) in which Panhandle, an intervener before the Commission, sought review of a certificate granted to Michigan Wisconsin Pipe Line Co. containing a rate condition identical with the rate condition in the *Alabama-Tennessee* case. Panhandle claimed the certificate was invalid because in the certificate hearing there was no proof or finding that the proposed rate was satisfactory. The Court said such proof and findings were not necessary to the issuance of a certificate. Later the Commission held rate hearings in which a "just and reasonable rate" was determined for Michigan Wisconsin Pipe Line Co.

The Court also refers to *Public Utilities Commission of Conn.* v. *Federal Power Commission*, 205 F. (2d) 116, 120 (C.A. 3, 1953), but that case is not related to any issue in this case. The case involved a request by Transcontinental Gas Pipe Line Company to be relieved of its obligations under a certificate previously issued to it by the Commission. The Court held that the Commission had authority under the Natural Gas Act to grant such a request. The original certificate authorized construction of certain facilities by Transcontinental on condition that it charge no higher rates than it had proposed in the proceedings and which it had previously agreed to file (See *Tennessee Gas Transmission Co., et al.*, Docket No. G-1248, et al., 9 F.P.C. 262, 286 (1950). See too, footnote 11, *supra*.

certificates containing the rate conditions so that the validity of the rate conditions was not the basic issue presented.

The effect of the instant rate condition is a far more definitive determination with respect to petitioner's rate than the Commission intended. The Commission assumed that petitioner was free to file, under the provisions of Section 4(e) of the Act, a change in rates whenever it so desired (J. App. 452a). But this assumption is plainly contrary to the fact. Compliance with the rate condition would necessitate negotiation of a new twenty (20) year contract by petitioner with Cities Service providing for the rate specified by the Commission. The present contract does not permit petitioner to change the price and it is more than doubtful that a newly negotiated contract would extend such a privilege to petitioner. In the absence of mutual agreement to that effect, petitioner, in view of this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* cannot unilaterally effect a change in rate.

Moreover the decision of the Court of Appeals in this case reveals that it erred in assuming that petitioner sought to challenge the Commission's power to impose *all* rate conditions. This is plainly not the fact. Petitioner challenges only the Commission's power to impose those rate conditions which *per se* modify rates without regard to the procedural requirements and substantive criteria of Section 5(a) of the Act.

The failure of the Court of Appeals in this case to construe the provisions of Sections 7(c) and (e) on the one hand, and Section 5(a) on the other, so as to

avoid a conflict between them and its blanket endorsement of all rate conditions without regard to the limitations imposed by Section 5(a) upon the Commission's power to modify and lower rates, gives the Commission unlicensed power to substitute its own standards and criteria respecting the regulation of the rates of natural gas companies for the explicit standards established by Congress in Section 5(a).

As a consequence of the Court of Appeals' decision an applicant for a certificate may be deprived of the right to defend against an invasion of his property, may be denied the right to enter, at the proper time, a plea of confiscation and may have an arbitrary and capricious rate fixed by the Commission on the basis of a record which was never intended to prove or disprove the justness and reasonableness of its rate. Such unlimited power in the hands of an administrative body is repugnant to the basic principles of a system of constitutional government.

2. The Court of Appeals Has Decided a Federal Question in Conflict With Applicable Decisions of This Court.

The decision of the Court of Appeals sanctions an arbitrary reduction of petitioner's rate without a full and adequate hearing in respect thereto and thus petitioner has been deprived of its property without due process of law.

It is essential to due process of law, as this Court stated in *Morgan* v. *United States,* 304 U.S. 1 (1938) that:

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be

fairly advised of what the Government proposes and to be heard on its proposals before it issues its final command."

In this case petitioner has not been afforded a reasonable opportunity to know that the Commission proposed to modify and reduce the rate established in its twenty year gas sales contract. The record shows that neither petitioner, the interveners, nor counsel for the Staff of the Commission were advised that the Commission proposed to fix a rate in this proceeding for petitioner's sale of gas to Cities Service. The Commission itself gave no indication of its intentions until it issued a final certificate containing the rate condition here complained of, which modified and reduced petitioner's rate.

Despite the fact that petitioner had already filed its twenty year contract with the Commission as a rate schedule, and despite the fact that one of the interveners had protested the filing of such rate schedule, the Commission never set down for hearing the question of the lawfulness of petitioner's rate, as required under Section 5(a) to support a rate determination by the Commission. If the Commission had done so, petitioner would have been afforded an opportunity to know what the Commission proposed to do.

Instead of the foregoing the Commission issued an order stating only that it proposed to hold a hearing pursuant to the certificate provisions of Section 7 of the Act, respecting the matters and issues presented by petitioner's certificate application. (J. App. 246a).

As more fully described in the statement *supra*, such a hearing was held. At the hearing the position of the interveners was clear. The interveners were

seeking either a modification of petitioner's rate or a denial of petitioner's application. The counsel for the Staff of the Commission took no position in respect of petitioner's rate. He indicated that he was interested in developing all of the facts and that he assumed petitioner was aware of the issues presented by a certificate application under Section 7 of the Act (J. App. 92a-93a). However, after the hearing had ended and there was no further opportunity to present testimony and evidence, counsel for the staff filed a brief with the presiding examiner in which for the first time he argued that petitioner's rate should be reduced by means of a condition to the certificate to be issued to petitioner.

The presiding examiner recommended the issuance of a certificate to petitioner without modification of petitioner's rate. He based his recommendation primarily on the fact that a certificate hearing was not equivalent to a rate hearing and hence deprived petitioner of the full measure of the "procedural amenities" afforded to one whose rate is being investigated pursuant to the rate regulatory provisions of the Act (J. App. 339a-340a).

Finally, after exceptions were filed by the interveners and counsel for the Staff and oral argument was had before the full Commission, a majority of the Commission issued an order granting a certificate to petitioner on condition that petitioner file a specific different and lower rate. The majority's opinion categorically stated that this lower rate was not the just and reasonable rate which is required to be prescribed by Section 5(a) of the Act.

Petitioner submits that the order of September 20, 1954 giving notice that the Commission would hold

a hearing pursuant to Section 7 of the Act with respect to petitioner's certificate application (J. App. 246a) does not constitute notice that the Commission proposed to hold a rate investigation with respect to the rate set forth in the gas sales contract which petitioner had filed with the Commission as a rate schedule.

The "savings clauses" contained in the Commission's telegraphic temporary authorization of August 25, 1954 (J. App. 328a), the Commission's letter of acceptance of rate filing dated December 2, 1954 (J. App. 319a) and Section 154.101 of the Commission's Regulations (Appendix C) do not constitute notice that in a certificate proceeding the Commission will investigate a rate and prescribe a specific different lower rate. Properly, all that these various savings clauses assure is that issuance of a certificate shall not be a bar to the Commission's proper exercise of its rate regulatory functions at the proper time and in the proper manner and conversely that acceptance of a rate for filing does not insulate that rate from further proper regulation or act to relieve from the necessity of obtaining a final certificate authorizing the making of the sale to which the rate applies.

Nor would it be proper to infer such notice from the order of the Commission dated October 18, 1954 permitting intervention to Oklahoma Natural (J. App. 300a). Oklahoma Natural had filed both a protest against petitioner's rate schedule and a petition to intervene in the certificate proceeding. In the latter document, it clearly stated it was seeking either a modification of petitioner's rate or a denial of petitioner's certificate application. It also requested the Commission to vacate the temporary certificate previ-

ously issued to petitioner. The Commission's order granting intervention to Oklahoma Natural dealt with all of these various contentions. The purpose of granting intervention, it said, was to allow Oklahoma Natural to show, more specifically, what interest it had in this proceeding as a matter of fact and as a matter of law. With respect to the temporary certificate the Commission said Oklahoma Natural's interests were not prejudiced because such a temporary authorization involved no commitment that any particular rate would be authorized. This statement does no more than confirm the fact that rates are authorized only under the rate sections of the Act and not under the certificate provisions of Section 7. Finally, the Commission, in dealing with the protest filed by Oklahoma Natural noted that petitioner had made an initial rate filing under its rules and that it had no power to reject such a filing.

In this context, and since the subsequent order of the Commission granting intervention to Lone Star and the municipalities (J. App. 307a) was routine in character, petitioner could only speculate upon the intention of the Commission. The most limited view of the order is that since Oklahoma Natural alternatively sought a denial of petitioner's application, intervention was granted for that purpose alone. Again, because the Commission said Oklahoma Natural should show what interest it had in this proceeding as a matter of fact and as a matter of law, it might be presumed that the Commission intended to review the evidence to be submitted by Oklahoma Natural for the purpose of deciding whether it was appropriate to initiate a rate investigation under Section 5(a).

That the Commission had no clearly defined intention to investigate petitioner's rate during the course

of the certificate proceeding is emphasized by its order of February 4, 1955 (J. App. 321a) denying a motion to dismiss filed by the municipal interveners, who had contended that petitioner's application should be dismissed *in toto* because petitioner had not presented a utility rate base cost-of-service study or comparable data similar to that required by interstate pipeline transporters in the certificate applications filed by that class of natural gas company. This order was issued more than two months after the hearing had ended, while the presiding examiner still had the matter under consideration. In this order the Commission said: "Whether Signal (petitioner) has justified or must justify its proposed 12 cents per Mcf rate is a matter for argument in briefs and determination in the ultimate decision of this case."

In October 1954, no body of administrative precedent had then been evolved respecting the precise matters and issues that should properly be considered by the Commission in disposing of an independent producer certificate application. The only guideposts available to petitioner were the requirements of Section 7(e) of the Act itself and the Commission's regulations under the Act dealing with the certificate applications of independent producers.[14] Petitioner's certificate appli-

[14] There is a striking difference between the certificate regulations applicable to an independent producer and those applicable to an interstate pipeline transporter. No provision is made in the regulations for an independent producer to obtain a certificate to construct facilities, while the regulations applicable to interstate gas pipeline transporters (18 CFR 157.5-.22) are primarily concerned with construction, costs, and revenues in order to determine the economic feasibility of the construction. An independent producer has already incurred the costs incident to drilling wells and building gasoline plants before he applies for a certificate. Hence economic feasibility is not an important question in an independent producer certificate case.

cation and the evidence and testimony it presented fully met the requirements of both the statute and the Commission's Regulations applicable to it.

If rates may properly be considered definitively in a certificate proceeding at all, the Commission had a duty to advise petitioner that it desired to investigate petitioner's rate and determine a just and reasonable rate for its sale of gas to Cities Service in order to assure petitioner of a fair hearing. To do less would not even constitute a gesture of due process. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

The principles enunciated by this Court in the *Morgan* case, *supra,* are clearly controlling here. Indeed, the Commission's action in this case is an even more flagrant disregard of the essentials of a fair and adequate hearing than was involved in *Morgan.* In the *Morgan* case, appellants were advised that the hearing was to be concerned with an inquiry into the reasonableness of their rates and the final order was held invalid because no specific complaint was formulated by the Government. Here, there is a total absence of a notice of any inquiry into petitioner's rate. The fact is that the proceeding in this case was initiated and concluded under a section of the Act which dealt not with rates but with certificates of public convenience and necessity.

Moreover, it is not enough to satisfy the requirement of a fair hearing that petitioner had the right under the Natural Gas Act to apply for a rehearing of the final order of the Commission granting petitioner a certificate. This Court has clearly held in *Gonzales* v. *United States,* 348 U.S. 407 (1955), that the right to a rehearing offers too little protection be-

cause the right to present one's side of the case is broader than the right to correct "errors" in the final order issued. In *Gonzales,* the Court cited its opinion in the *Morgan* case as correctly stating the essentials of a fair hearing in a quasi-judicial proceeding before an administrative agency.

What petitioner was entitled to, but did not receive, was a proper notice that the Commission intended to investigate petitioner's rate similar to the notice given in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 349 (1938), cited with approval by this Court in denying a rehearing to the Government in the *Morgan* case, 304 U.S. 22 (1938).

Plainly, the Commission has denied petitioner a fair and adequate hearing with respect to petitioner's rate, as that rate has been initially established in the sales contract negotiated with Cities Service, contrary to the principles established by this Court in the *Morgan* case and re-affirmed in the *Gonzales* case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 14, 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,867

SIGNAL OIL AND GAS COMPANY, a corporation, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

OKLAHOMA NATURAL GAS COMPANY, *Intervenor*

LONE STAR GAS COMPANY, *Intervenor*

PETITION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION.

Argued October 18, 1956

Before MARIS, GOODRICH and MCLAUGHLIN, *Circuit Judges.*

Opinion of the Court

(Filed November 20, 1956)

By GOODRICH, *Circuit Judge.*

This case raises a question of construction of section 7(e), 56 STAT. 84 (1942), 15 U.S.C.A. § 717f(e), of the Natural Gas Act. Our power to review is found in section 19(b), 52 STAT. 831 (1938), 15 U.S.C.A. § 717r(b). The facts of the case are simple and undisputed. The sole question involved is one of law having to do with the interpretation of section 7(e).

Signal Oil and Gas Company has a gasoline plant in Carter County, Oklahoma, the purpose of which is to process "casing-head" gas which is natural gas produced in association with oil in an oil well. Signal finished the construction of its plant in 1954 and made a contract with Cities Service Gas Company to sell the processed "residue" gas to it at 12 cents per Mcf (thousand cubic feet). Then it wired the Federal Power Commission for a temporary certificate on the ground that prompt action was required to prevent wasting of the gas. The Commission replied the next day by telegram granting a temporary leave to do business but explicitly stating that the permission was granted subject to any orders which the Commission might thereafter make.[1]

Signal thereupon started to do business and to sell its gas. Meanwhile proceedings under section 7(c) of the Act, looking to the issuance of a certificate of public convenience and necessity were had. The Oklahoma Natural Gas Company, Lone Star Gas Company and nine municipalities were given permission to intervene and were heard in the course of the proceedings. Eventually the Commission

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[1] The telegram stated: "This [authorization] is without prejudice to such disposition of the application [for a permanent certificate under section 7(c)] . . . as the record may require."

Signal filed its contract as a rate schedule shortly afterwards and an acknowledging letter from the Commission stated in part:

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate . . . and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending . . ."

The Commission's rules put Signal on further notice that, "Acceptance for filing of any rate schedule . . . is not to be construed as approval by the Commission, *nor to serve in lieu of any of the requirements under Section 7 of the Natural Gas Act.*" (emphasis added). 18 C.F.R. 154.101 (Supp. 1956).

acted and issued a certificate of public convenience and necessity but conditioned upon a 10 cent gas rate by the applicant company instead of the 12 cent rate which it proposed and, in fact, was charging under the temporary certificate.

This is the condition which Signal says will not do at all. It insists that the Commission has no power to attach rate conditions under section 7. It makes the argument that if the Commission is dissatisfied with what Signal charges, section 5(a) of the Act provides an elaborate process for investigation and the fixing of a proper rate. If Signal itself wants to change its rate there is a provision for that in the Act, section 4(d). Signal makes much of the proposition that its rate filed at the time it asked for the emergency certificate has "become invested with a compelling and decisive legal significance." It says that this rate "is the effective rate governing petitioner's sale. It is the only legal rate." This statement is true in so far as it means that no other rate could have been charged while the temporary certificate was in effect. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). But it is quite another thing to say that by accepting the filing of the rate schedule when it granted the temporary certificate the Commission precluded itself from exercising any conditioning power it had under section 7(e). *Cf. Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467, note 5 (3d Cir. 1956); *Alabama-Tennessee Natural Gas Co.* v. *FPC*, 203 F.2d 494 (3d Cir. 1953).

As originally passed, the Natural Gas Act did not specifically grant the Commission power to condition a certificate. But prior to any amendments in this respect, the Fifth Circuit held that the Commission had power to impose reasonable conditions on a certificate. One of the conditions involved was that the applicant should not charge more than the proposed rate of 10 cents per Mcf.

Arkansas-Louisiana Gas Co. v. FPC, 113 F.2d 281 (5th Cir. 1940).[2]

In 1942 section 7(e) was added to the Act. It provides in part: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

We think this language is pretty clear. Such legislative history as we have tends to show that Congress was advised of the addition to the Commission's express authority and approved thereof.[3] Several cases have recognized

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[2] The details of the rate condition appear in the Commission's order, Louisiana-Nevada Transit Co., 2 F.P.C. 546, 30 P.U.R. (n.s.) 40 (1939).

[3] In hearings on the amendment which added section 7(e) to the Act, Commissioner Manly cited the Louisiana-Nevada Transit case, *supra* note 2, as an example of the proposed application of the amendment. He said:

> "Now, that certificate was authorized to be issued with those several conditions attached and specified, for instance, the rates that would be charged these cement mills."

Mr. Boren, a Committee member, commented:

> "*I have no objection at all to the Commission having power to exact conditions such as you outline.* My objection is not to the power exercised under those conditions, but to the language of the bill which does not limit you in the sort of conditions you should exact. . . . *As to this condition you mentioned, I think you should have that power;* but then there should be some restrictions on what conditions could be exacted . . ." (emphasis added).

Mr. Boren went on to say:

> "We can limit those conditions to conditions affecting rates, services, and things of that nature."

Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., 23-24 (1941).

The House report stated:

> "The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize . . . the characteristics

this power,[4] and it has never been successfully challenged.

The Commission has assumed it had the power to impose rate conditions on certificates under the provisions of section 7(e). We are advised that its annual report to Congress for 1955 shows 38 certificate orders subject to rate filing conditions during that fiscal year; 1954, 52 certificates with rate conditions; 1953, 52 such conditions and so on for several prior years. The Commission, of course, cannot enlarge its own statutory authority. But as this Court pointed out in *Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467, 471 (3d Cir. 1956), "This interpretation of its authority by the Commission through the years must

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of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand."

H.R. REP. No. 1290, 77th Cong., 1st Sess., 2-3 (1941).

The Senate report also indicated the amendment allowed the Commission to scrutinize rates as part of the certification process. SEN. REP. No. 948, 77th Cong., 2d Sess., 2 (1942).

[4] In *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467 (3d Cir. 1956), it was held that a certificate was properly conditioned on filing interruptible rate schedules (note 4). Also, the filed rate contracts provided that certain consumers reimburse the pipe line for construction costs through additional charges on gas delivered. Held: the Commission could impose the condition that no further payments be made by the consumers for construction (note 5).

Panhandle Eastern Pipe Line Co. v. *FPC*, 169 F.2d 881 (D.C. Cir.), *cert. denied*, 335 U.S. 854 (1949), held a certificate properly conditioned on filing rates satisfactory to the Commission and also S.E.C. approval of proposed financing.

In *Public Utilities Commission of Conn.* v. *FPC*, 205 F.2d 116, 120 (3d Cir. 1953) this Court noted without discussion the existence of a condition in a certificate that a satisfactory rate must be filed.

In *Alabama-Tennessee Natural Gas Co.* v. *FPC*, 203 F.2d 494 (3d Cir. 1953), a certificate was conditioned on filing a satisfactory rate. Before such a rate was filed and while a temporary rate was in effect the pipe line attempted to increase its rates by filing under section 4(d). This Court held that section 4(d) could not be used to change a rate before the condition in the certificate was met. Although there was no challenge to the Commission's power to impose a rate condition, the Court's conclusion that the Commission had such power was a necessary part of its holding.

be given considerable weight," especially since left undisturbed by Congress when the Act was amended in 1954.[5]

Signal rejects the binding effect on it of the cases cited. It correctly points out that those cases concern pipe lines and Signal is an "independent producer," another class of "natural-gas company" which has been regulated under the Act only since the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, *rehearing denied*, 348 U.S. 851 (1954). Signal also points out differences in some of the Commission's rules and procedures applicable to each class. Agreed that there are such, we fail to see how these differences are relevant to the issue of the Commission's power to condition certificates under section 7(e).

Signal suggests that even if the Commission has power to condition a certificate on the filing of a rate satisfactory to the Commission, it has no power to condition a certificate on a particular rate. Since setting a particular rate is not of itself improper,[6] we see no reason why a distinction should be drawn between the two types of conditions. The Commission informs us its annual report to Congress for 1952 revealed that sometimes, "the applicant may be required to file a definite and specific rate [as a condition to receiving a certificate]; i.e., the proper rate is spelled out in dollars and cents." Congress left this practice undisturbed. See *Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467, 471 (3d Cir. 1956).

The question of the rate to be fixed as a condition to the granting of the certificate was gone into at length in the proceedings before the Commission. The record shows that at the time of the proceedings all other sales in the area were at 10 cents or less; the average rate was 9.9 cents.

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[5] 68 STAT. 36 (1954), adding § 1(c), 15 U.S.C.A. § 717c.

[6] The Commission is specifically given power to set a particular rate by section 5(a). The setting of a particular rate was not disapproved in Alabama-Tennessee Natural Gas Co. v. FPC, 203 F.2d 494 (3d Cir. 1953) and Arkansas Louisiana Gas Co. v. FPC, *supra*.

There was evidence introduced by the intervenors that an increase in price paid by one purchaser would increase the market price in the whole area, and if Signal received 12 cents, the market price would rise to 12 cents to the great expense of the ultimate consumers. Signal offered no evidence to justify the reasonableness of the proposed 12 cent rate, nor did it claim that the 10 cent rate was confiscatory. Under the circumstances, substantial evidence supports the Commission's finding that public convenience and necessity required the certificate to be conditioned on a 10 cent rate.

Our conclusion is that what the Commission did here was clearly within its statutory authority and the order of the Commission is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,867

SIGNAL OIL AND GAS COMPANY, a corporation, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*
OKLAHOMA NATURAL GAS COMPANY, *Intervenor*
LONE STAR GAS COMPANY, *Intervenor*

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION

Present: MARIS, GOODRICH and MCLAUGHLIN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said Federal Power Commission in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

November 20, 1956

APPENDIX C

Pertinent Provision of the Constitution of the United States

AMENDMENT V

"No person shall be * * * deprived of life, liberty or property, without due process of law; * * *."

Pertinent Provisions of Natural Gas Act

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a

decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

7 (c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That

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[1] Subsection 7 (c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c) (1946)][2]

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[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

7 (d)[3] Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commisison shall, by regulation, require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (d) (1946)]

7 (e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e) (1946)]

Pertinent Provisions of Commission's General Rules and Regulations

Sec. 154.92 (b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas

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[3] Subsection 7 (d) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

[4] Subsection 7 (e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed. (18 CFR 154.92(b)).

Sec. 154.93. For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practicse, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission. (18 CFR 154.93).

Sec. 154.101. Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act. (18 CFR 154.101)

Sec. 157.23 (b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in

any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the Commission to consider all related matters concurrently. (18 CFR 157.23(b))

Sec. 157.24 (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the

contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibits A of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

Section 157.24 (b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days. (18 CFR 157.24)

Sec. 157.25 There shall be filed with the application as a part thereof the following exhibits.

Exhibit A. Map. Each applicant under section 157.24 shall file as a part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A. The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipeline systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24(a)(4)(iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); *and provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. Escalation clauses in contracts submitted hereunder on or after May 1, 1955 will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas. (18 CFR 157.25)

Sec. 157.26 An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of the Rules of Practice and Procedure, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth. (18 CFR 157.26)

Sec. 157.27 The applicant may be required to furnish such additional information as the Commission may deem pertinent. (18 CFR 157.27)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 772

SIGNAL OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions and orders of the Federal Power Commission (R. 433a–468a, 494a–499a) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a–7a) is reported at 238 F. 2d 771.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1956 (Pet. App. 7a–8a). The petition for a writ of certiorari was filed on February 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Federal Power Commission properly conditioned its grant under Section 7 of the Natural Gas Act of a certificate of public convenience and necessity—authorizing petitioner, Signal Oil and Gas Company, to sell natural gas for resale in interstate commerce to Cities Service Gas Company—on the requirement that the rate charged for such sale be 10 cents per Mcf, the highest price prevailing in that area, rather than 12 cents per Mcf provided in the Signal-Cities Service contract.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, *et seq.*, are set forth in the Appendix *infra*, pp. 20–23.

STATEMENT

The Federal Power Commission granted to petitioner Signal Oil and Gas Company a certificate of convenience and necessity for sale of certain gas to Cities Service Gas Company on the condition that Signal file a rate of 10 cents per Mcf for the gas to be sold, rather than the 12 cent rate provided in the sales contract between Signal and Cities Service. Over Signal's objection to that condition, the Court of Appeals affirmed (Pet. App. 1a–7a). The pertinent facts may be summarized as follows:

Proceedings leading up to the Commission's order

By contract dated July 6, 1954, Signal Gas and Oil Company agreed to sell and deliver from its Fox Gaso-

line Plant,[1] then under construction in Southern Oklahoma, a minimum daily amount of 30,000 Mcf of natural gas to Cities Service Gas Company for resale in Kansas and Missouri. The contract, which was to be effective for 20 years, provided for a price of 12 cents per Mcf for the gas, subject to a price adjustment or renegotiation provision effective each five-year period and a "favored nations" clause, which provided for Cities Service's paying Signal a price equal to the highest price it paid for gas purchased under similar circumstances in that area (R. 167a–187a).

Recognizing that, as a result of the sale, it would become a natural gas company subject to the Commission's jurisdiction under the Natural Gas Act, Signal, on August 24, 1954, shortly after the completion of its Fox Plant, filed with the Commission an application, under section 7 (c) of the Act, *infra*, pp. 22–23, for authority to make the sale to Cities Service in accordance with the contract (R. 221a–227a).[2]

On the same day, August 24, 1954, Signal, asserting

[1] The Fox Gasoline Plant was a plant for the processing of casinghead gas (*i. e.*, gas produced in association with oil) by removing the heavier hydrocarbon components. After removal of any impurities and providing additional compression, if required by contract, the natural gas remaining (usually called residue gas) is ready for delivery to a purchaser.

[2] Cities Service simultaneously filed an application for authority to construct and operate the pipeline necessary to connect its existing facilities to the Fox Plant where the delivery was to be made (R. 213a–217a). The application was consolidated for hearing with Signal's (R. 246a–249a) and was ultimately granted (R. 454a). There is no issue in this case as to the Cities Service certificate.

that the Fox Plant was wastefully flaring more than 30,000 Mcf of gas per day, requested the Commission to issue a temporary certificate for the sale in the interest of conservation (R. 228a). The Commission granted this request with the *caveat* that its action was "without prejudice to such disposition of [Signal's application for permanent authority] as the record may require" (R. 228a). Thereafter, on September 20, 1954, the Commission gave notice of Signal's application and set it for hearing on October 28, 1954 (R. 246a–249a).

Meanwhile, on September 14, 1954, Oklahoma Natural Gas Company, a large purchaser in the area and a local distributor of natural gas within Oklahoma, had applied to the Commission for leave to intervene in the proceeding and for vacation of petitioner's temporary certificate. Oklahoma Natural also protested petitioner's proposed 12 cent rate schedule, on the grounds that the prevailing price in the area was 10 cents per Mcf (R. 229a–238a), and that by virtue of the "favored nations" clauses in its purchase contracts the effect of permitting the 12 cent rate contemplated by the Signal-Cities Service contract would be to increase the currently established price in the area and thereby to imperil Oklahoma Natural's entire price structure (R. 237a). Oklahoma Natural concluded by urging the Commission to reject the 12 cent rate schedule and to establish the current price for the sale at 10 cents (R. 237a–238a). Lone Star Gas Company, a "natural-gas company" which also purchased large volumes of gas in the area, similarly

sought to intervene in opposition to allowance of the 12 cent rate; it urged that the Commission should condition, as it had frequently in the past, its grant of a certificate—here, on the requirement that the rate not exceed the current 10 cent price paid in the area (R. 289a–299a). The Commission, in permitting these interventions (R. 300a–303a, 307a–308a),[3] rejected Oklahoma's requests relating to the temporary certificates, pointing out, however, that they "are not a commitment that certificates * * * will be issued after the necessary hearings * * * nor that any particular rates will be authorized if certificates are issued" (R. 302a).[4]

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[3] The Commission also permitted the intervention of nine municipalities, all customers or representing customers of Cities Service (R. 307a). They also were opposed to the 12 cent rate provided in the Signal-Cities Service contract (R. 287a–288a).

[4] Subsequently, on December 2, 1954, the Commission advised Signal that the Signal-Cities Service contract had been accepted for filing and had become effective on October 8, 1954. However, the Commisison admonished (R. 319a):

"This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; * * * and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."

The Commission's regulations are to the same effect:

"*Acceptance for Filing Not Approval.*—Acceptance for filing of any rate schedule or part thereof * * * is not to be construed as approval by the Commission, nor to serve in lieu of any requirement under Section 7 of the Natural Gas Act. [18 C. F. R. 154.101.]"

Since there was no question that Signal was a natural gas company subject to the Gas Act and that it had otherwise satisfied the requirements for the granting of a certificate, the principal issue before the Commission related to the contention of the intervenors and the Commission's staff that the granting of the certificate should be on the condition that the rate to be charged be 10 cents per Mcf.

Dealing with this issue, the Commission first rejected Signal's claim that it was without such authority (R. 443a):

> * * * The Commission has long followed the practice of imposing rate conditions where appropriate in granting certificates of public convenience and necessity and the power so to do has been upheld by the courts. * * *

In this connection, the Commission pointed out that the 12 cent rate schedule, although accepted for filing, had not been approved, and that the temporary authorization had been given without prejudice to such disposition of Signal's application as the record might require (R. 445a).

Turning to the propriety of such a condition in this case, the Commission noted that the record evidence showed without contradiction that the present maximum price for the more than 400,000 Mcf of natural gas sold per day in the area was 10 cents per Mcf, having increased steadily from 5 cents per Mcf from 1945–1950 and from about 6 cents from 1950 to 1952 (R. 441a).

The Commission continued (R. 442a):

> The contention of Oklahoma Natural and Lone Star that a 12 cent sales price by Signal will "drive" the maximum price in the area from 10 to 12 cents is not contradicted by Signal, and a witness for Cities Service admitted that this would be the effect of the sale as proposed. Although the "favored nations" clauses in the existing contracts of Oklahoma Natural and Lone Star would not be "triggered" by the price Cities Service pays Signal, nor would any of Cities Service's "favored nations" clauses be "triggered", the record clearly shows that the price proposed by Signal would inevitably cause a general area price increase for all major sales to 12 cents per Mcf as the result of future purchases of new supplies of gas. * * *[5]

The Commission also commented that Oklahoma Natural had shown that a general two cent increase in the cost of purchased gas would cost it approximately $2,000,000 a year and that Lone Star had stated that the comparable cost to it would be approximately $1,140,000 a year (R. 442a).

Rejecting Signal's argument that the 12 cent rate was reasonable because reached by arm's length bargaining under free competitive economic conditions,[6]

[5] The Commission emphasized that this conclusion was reached without consideration of the fact that, under *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, the Commission had jurisdiction over the sales to Lone Star and Cities Service (R. 442a). However, since Oklahoma Natural operated entirely within Oklahoma, the Commission's control over the sales in the area is not complete.

[6] In questioning whether the contract was an arm's length transaction, the intervenors pointed out that, since Cities Service has an affiliate engaged in producing gas in the area, Cities Service would

the Commission found that the evidence did not show that Signal's proposed 12 cent rate was just and reasonable and that Signal had failed effectively to challenge either the evidence attacking its proposed rate or that supporting a 10 cent rate (R. 451a). Consequently, in view of the admitted injury which would result to other gas purchasers in the area from the allowance of the 12 cent rate—injuries which could not be undone in the time-consuming proceeding under Section 5 (a) of the Act, pressed by Signal as the proper procedure—the Commission ordered that the certificate should be conditioned on the fixing of a 10 cent rate (R. 452a–453a).[7]

In so ordering, the Commission pointed out that it was not finding the 10 cent rate to be just and reasonable, but that it was fixing a 10 cent rate as a condition of the certificate merely as an interim measure calculated best to protect the public interest by forestalling a perhaps unwarranted area price increase (R. 451a). Signal, the Commission concluded, was not precluded from seeking a change in its rate structure as provided in Section 4 (d) of the Act, and in proceedings on such a proposed change the Commission could pass on the reasonableness of the changed rates (R. 452a).

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ultimately profit from the general 2-cent price increase which would be precipitated by the 12 cent rate contemplated by the contract. The Commission, however, pointed out that there was no evidence that Signal was aware of such a plan or that it was affiliated with Cities Service. Although the Commission refused to find that the contract was not the result of arm's length bargaining, "the opportunity for profit to * * * Cities Service is present, and is a consideration in this case" (R. 449a–450a).

[7] Two Commissioners dissented (R. 456a–466a).

ARGUMENT

1. Relying on Section 5 (a) of the Act, *infra*, pp. 21–22, which authorizes the Commission after hearing to pass on the reasonableness of "any rate * * * demanded, observed, charged, or collected by any natural-gas company * * *" in connection with activities subject to the Commission's jurisdiction, Signal urges that the Commission has no authority to impose the 10 cent rate in connection with its grant of authority to make the sale to Cities Service. According to Signal, the imposition of such a condition creates the possibility of conflict between Section 5 (a) and Section 7 (e) of the Act (*infra*, pp. 21–22, 23)—the provision authorizing certification of new sales or services, under which this rate condition was imposed—and such possibility of conflict, it is said, should be avoided in favor of a harmonious interpretation of these provisions "so as to produce a symmetrical whole" (Pet. 12).

(*a*). These arguments are primarily based on a misunderstanding of the scope and effect of Section 5 (a). That Section, on its face, relates only to rates already legally effective, *i. e.*, "rate[s] * * * demanded, observed, charged or collected * * *." Here, there was no such legally effective rate,[8] for a rate cannot be effective until the underlying sale itself has been authorized, and the authority to make the Cities Service

[8] Neither the rate charged under the temporary certificate, which was effective only during the period covered by that certificate, nor the filing of the Signal-Cities Service contract with the Commission, resulted in a legally effective rate under the permanent certificate, particularly in view of the explicit conditions attached to the Commission's actions. See *supra*, pp. 4–5 and fn. 4.

sale was given by the Commission simultaneously with its imposition of the 10-cent rate condition. Accordingly, the instant case does not concern rates already effective, as to which Section 5 (a) is applicable, but only rates to be charged for a sale then being authorized. Since the authority to impose rate conditions under Section 7 (e) operates only as to the latter class of rates, such authority plainly complements Section 5 (a) and forms part of an integrated statutory structure. There is neither inconsistency nor conflict.

(*b*). This conclusion is confirmed by the language of Section 7 (e), its legislative history, and the relevant judicial decisions and administrative practice, as well as by important practical considerations. All these clearly demonstrate that the Commission has authority to impose such rate conditions.

Section 7 (e) expressly provides:

> * * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions* as the public convenience and necessity may require. [Emphasis added.]

This plenary language, in itself, plainly vests the requisite authority in the Commission, but any doubts on that score are removed by the legislative history of the provision, which was added to the Act in 1942, four years after the statute's original enactment in 1938. Even prior to this addition, the Commission had conditioned its grant of a certificate on the requirement that the rate be not in excess of 10 cents

per Mcf (*Louisiana-Nevada Transit Co.*, 2 F. P. C. 546) and the condition was sustained upon judicial review. *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (C. A. 5). This very rate condition was referred to and accepted in the House hearings on the 1942 amendment as an illustration of how the proposed amendment would operate. See Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5249, pp. 23–24 (Commissioner Manly, Representative Boren). The interested Committees indicated their understanding that the amendment would give the Commission wide control over the rate structure proposed in connection with a certificate application. S. Rep. No. 948, 77th Cong., 2d Sess., pp. 1–2; H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2–3. For example the House Committee stated (*ibid.*):

> * * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they

would have had if they had been made before the public was asked to finance the enterprise.[9]

In accordance with this clear legislative purpose, the Commission has, on many occasions, imposed rate conditions in granting certificates,[10] and the industry appears generally to have accepted them as valid. In contrast to the large number of such conditions imposed by the Commission, judicial review has been sought in very few instances. Significantly in each instance the Commission's action was affirmed. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power*

[9] Signal says that the Committee report uses the term "scrutinize," and that fixing rates is far more than "scrutiny" (Pet. 13). However, when read in context and particularly together with the statutory language itself, there can be no doubt of the Congressional intention expressed in the excerpt we have quoted in the text.

[10] According to the Commission's 1955 Annual Report to Congress (p. 136), thirty-eight certificate orders were issued subject to rate filing conditions during that fiscal year; the 1954 Report (p. 128) lists fifty-two certificates with conditions; the 1953 Report (p. 112), fifty-two; the 1952 Report (p. 111), seventeen; and the 1951 Report (p. 110), thirty-six. In its 1952 Report, the Commission explained its rate condition practice in detail (pp. 110–111):

"* * * rate conditions are in one of four general forms, depending upon the particulars of the case involved. First, the applicant may be required to file a definite and specific rate; i. e., the proper rate is spelled out in dollars and cents. Second, the condition may require the filing of rates satisfactory to the Commission, shortly before commencement of the proposed service. * * * Third, the Commission may allow certain rates to become effective for an interim period of operation, with permanent rates to be filed on the basis of actual operating experience during the interim period. Fourth, a certificate authorizing deliveries to a new resale customer, by an existing pipeline system, may be conditioned to require that the sale be initiated under the pipeline company's applicable existing rate schedule. * * *"

Commission, 232 F. 2d 467 (C. A. 3), certiorari denied, 352 U. S. 891; *Public Utilities Commission of Connecticut* v. *Federal Power Commission*, 205 F. 2d 116 (C. A. 3); *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494 (C. A. 3); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (C. A. D. C.), certiorari denied, 335 U. S. 854.[11]

Moreover, it is noteworthy that the effect of Signal's position, *i. e.* that the Commission is precluded from considering proposed rates in connection with certificate application under Section 7, would be to leave natural gas companies free to file as their initial rates whatever rates they desired, however unreasonable on their face, and to retain the benefits thereof until the termination of a Section 5 (a) proceeding. As the Commission noted, "[a] proceeding under Section 5 (a) * * * is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period" (R. 450a–451a).[12]

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[11] It is, of course, irrelevant that these cases involved pipeline companies whereas Signal is an independent producer. The Natural Gas Act, including Section 7 (e), relates to the regulation of natural-gas companies, and by virtue of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, independent producers engaged in wholesale sales of gas in interstate commerce, as well as pipeline companies, are natural-gas companies subject to the Act.

[12] Upon a finding under Section 5 (a) that a rate charged is unreasonable, the Commission may only prescribe the rate which is thereafter to be observed. There is no provision for the refund of the excess over the reasonable rate charged for the period of the pendency of the Section 5 (a) proceedings, let alone for the period prior thereto.

2. Signal also argues that the Commission acted improperly by imposing a condition specifically fixing a 10 cent rate without finding the rate reasonable. In support of this position, Signal asserts that the rate conditions previously imposed by the Commission in other cases did not fix a specific rate but rather required only that the applicant file "a tariff satisfactory to the Commission at least six months prior to the commencement of operation", and that in the interim the Commission held hearings on the proposed rates (Pet. 16).[13]

However, the situations in the cases referred to by Signal were entirely different from that of the instant case; while such a rate condition was adequate to protect the public interest in those cases, the facts of the present case fully demonstrate that the specific 10 cent condition imposed here was likewise in the public interest. The earlier cases all concerned applications for authority to construct and operate new facilities; since the construction could not begin until authorized by the Commission, there was necessarily a substantial lapse of time before actual operation could begin, and, during this period, ample time was available for consideration of the proposed rate structure.

In contrast, in the present case Signal was in a position immediately to sell the gas once it had obtained the requisite authorization. Indeed, Signal

[13] Signal suggests that these hearings were held under Section 5 (a). However, examination of the orders involved reveals that the hearings were held under the authority of Section 7 and without reference to Section 5 (a).

had sought and had been granted a temporary certificate to sell the gas during the pendency of the permanent certificate proceedings, in order to prevent the wasteful flaring of gas (R. 228a; *supra,* pp. 3–4). Plainly, therefore, if the Commission were to grant the certificate as expeditiously as possible, the type of general rate condition preferred by Signal was inappropriate.

Moreover, in sanctioning a rate which was to be effective immediately, the Commission was confronted with the conflicting rates sought by the various parties. Signal was pressing for the 12 cent rate provided in its Cities Service contract. On the other hand, the intervenors were urging a 10 cent rate. In choosing between these alternative rates, the Commission noted that Signal had not only failed to discharge its burden of showing the 12 cent rate to be just and reasonable and in the public interest, but also it had not challenged effectively the evidence supporting a 10 cent rate or shown that the 10 cent rate would be confiscatory (R. 451a). *Supra,* pp. 7–8. In addition, according to the evidence which Signal had not disputed, 10 cents was the highest rate then prevailing in the area and a 12 cent rate would cause a general price rise resulting in substantial injury aggregating about $4,000,000 a year to the companies purchasing gas in the area and their customers (R. 440a–442a, 451a–452a). *Supra,* pp. 6–7.

Since this injury would not be avoided by permitting the 12 cent rate to become effective and thereafter instituting a rate investigation under Section 5 (a)

(see *supra*, pp. 8, 13), the Commission adopted the course which would best protect the public interest—including Signal's interest, as well as that of the purchasers in the area and the ultimate consumers. By imposing the 10 cent rate condition, the Commission held the line and prevented a perhaps unwarranted price increase. At the same time, it did not preclude Signal, if it chose to accept the certificate with the condition, from seeking, virtually immediately, to increase the rate to 12 cents under the procedures provided in Sections 4 (d) and 4 (e) of the Act, *infra*, pp. 20–21.[14] And it was in order to make it clear that it was not prejudging the reasonableness of a 12 cent rate in such a proceeding,[15] that the Commission took pains expressly to state that the 10 cent rate was not definitive nor was it being found to be just and reasonable. In these circumstances, the 10 cent rate condition, designed as it was as "an interim measure calculated best to protect the public interest in a timely manner" (R. 451a), was certainly a reasonable condition required by the public convenience and necessity within the meaning of Section 7 (e). Cf. *Ameri-*

[14] We do not understand Signal's suggestion that it might not be able to seek such a rate increase because Cities Service might not consent (Pet. 18). The Signal-Cities Service contract provided for a 12 cent rate, the very rate Signal would seek.

[15] Under Sections 4 (d) and 4 (e), *infra*, pp. 20–21, the Commission may suspend the effective date of the proposed increase for a period of up to five months and if, by the end of the suspension period, the Commission has not yet made its determination as to the reasonableness of the proposed increase, the new rate may be charged, subject to refund of the excess, if any, over the reasonable rate ultimately determined by the Commission.

can Power & Light Co. v. *Securities and Exchange Commission*, 329 U. S. 90, 112.

3. Signal's final contention is that it was deprived of due process in that the Commission's notice of hearing did not advise that rates would be an issue in the proceedings (Pet. 20).[16] But, apart from the consideration that the Commission cannot anticipate and enumerate in its notice of hearing all the issues which the evidence ultimately shows to be important, the fact is that Signal was aware, as early as the Commission was, that rates would be an important, if not the crucial, issue in the proceeding.

The notice setting the application for hearing (R. 236a) denied Signal's request for a shortened hearing and set the matter for formal hearing because of the filing of petitions to intervene (R. 246a–249a). And Oklahoma Natural's petition to intervene, to which the notice obviously referred, specifically objected to Signal's proposed rate and requested immediate remedial action by the Commission (R. 236a). *Supra*, p. 4. Subsequent documents filed by Oklahoma Natural strongly reiterated the same objection (R. 257a, 500a). Moreover, as early as October 12, 1954, still before the hearings were had, Lone Star, in its petition to intervene, expressly requested "that any certificate issued in these proceedings be conditioned so as to require Signal to file an initial rate

[16] Signal asserts also that it had no notice that there was to be a "rate investigation" (see *e. g.*, Pet. 22). As we have already shown, there was no rate investigation as such; all the Commission did was to prescribe a temporary interim rate directed at dealing with the problem confronting the Commission, leaving Signal to file rate increases under Section 4 (d) of the Act.

schedule which does not exceed the current price paid in the area in which Signal's plant is located. * * *" (R. 299a). *Supra*, pp. 4–5. And in denying Oklahoma Natural's requests to vacate the temporary certificate, the Commission specifically put Signal on notice that the course of action ultimately adopted might be taken. Referring to the temporary certificate issued, the Commission stated that "Such authorizations are not a commitment * * * that any particular rates will be authorized if certificates are issued * * *" (R. 302a). *Supra*, p. 5.

Despite the claim of lack of notice, there is no suggestion that Signal did not have ample opportunity to prepare its case on the rate issue. The hearings were held over a period of almost two months, with long recesses. Even if Signal became aware that the rate was in issue for the first time at the hearings—and the fact is that the principal focus of the hearings was on the rate issue—Signal had ample opportunity during the long recesses between hearings to prepare whatever evidence it desired to support its proposed rate and counter the opposing rate evidence introduced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1957.

APPENDIX

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, *et seq.*, provides, in pertinent part, as follows:

> SECTION 4. (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. * * *
>
> (e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as

would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classifica-

tion, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SECTION 7. [as amended by 56 Stat. 83] (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending

the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 772

SIGNAL OIL AND GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR OKLAHOMA NATURAL GAS COMPANY AND LONE STAR GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The Federal Power Commission's opinion and accompanying order (J. App. 433a-468a) are unofficially reported at 12 P.U.R. 3d 3. The Commission's order denying rehearing (J. App. 494a-499a) is reported in preliminary print at 15 F.P.C. 1020. The opinion of the Court of Appeals (Pet. App. A, 1a-7a)[1] is reported at 238 F. 2d 771.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1956 (Pet. App. B, 7a-8a). The petition for a writ of *certiorari* was filed on February 14, 1957. The jurisdiction of this Court is invoked under

[1] Petitioner's Appendices A, B and C are set forth in its petition for a writ of *certiorari*.

28 U.S.C. 1254(1) (1952) and § 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952).

QUESTION PRESENTED

Whether under the authority of § 7(e) of the Natural Gas Act the Federal Power Commission may condition a certificate of public convenience and necessity so as to permit a sale at an initial rate no higher than that found after hearing to be required by the public convenience and necessity.

STATUTE INVOLVED

The relevant portions of the Natural Gas Act are set forth in petitioner's Appendix C at pp. 8a-11a.

STATEMENT

Petitioner, operator of a gasoline plant in Carter County, Oklahoma, on August 24, 1954, filed with the Federal Power Commission (Commission), at Docket No. G-2570, an "Application for Certificate of Public Convenience and Necessity Under Section 7 of the Natural Gas Act, as Amended". Said application requested that the Commission authorize a sale of residue gas at a price beginning at 12¢ per Mcf, two cents higher than any sale in the area, to Cities Service Gas Company (Cities Service) for transportation in interstate commerce and resale in accordance with a contract between petitioner and Cities Service (J. App. 221a-227a).[2]

[2] On the same day, petitioner by telegram requested a temporary certificate covering such sale under § 7(c) of the Act. The following day the Commission by telegram granted the temporary authorization stating that such authorization was "without prejudice to such disposition of the application at Docket No. G-2570 as the record may require" (J. App. 228a).

Pursuant to §§ 154.92 and 154.93 of the Commission's Regulations under the Act (Pet. App. C, 11a-12a), requiring the filing of a rate schedule to cover any proposed sale, including a temporary sale, petitioner on September 7, 1954, filed its contract with Cities Service as a rate schedule (J. App. 317a-318a). The Secretary of the Commission advised petitioner by letter that the contract had been accepted for filing and had become effective on October 8, 1954. The acceptance contained the following qualifications (J. App. 319):

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."[3]

A week later, in the proceeding at Docket No. G-2570, Oklahoma Natural Gas Company (Oklahoma Natural) filed a petition for leave to intervene, application for vacation of the temporary certificate and protest

---

[3] Section 154.101 of the Commission's Regulations (Pet. App. C, 12a) governing petitioner's rate schedule filing provides:

> "*Acceptance for filing not approval.* Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act." (Commission's italics).

against petitioners proposed rate schedule (J. App. 229a-238a), a copy of which was served on petitioner. This pleading asserted Oklahoma Natural's interest in the proceeding, and opposition to certification at the rate proposed to be charged by petitioner. The prayers requested, *inter alia*, "that the current price for gas sold by [petitioner] to Cities Service * * * be established at 10¢ per M. c. f.", in lieu of the 12¢ per Mcf price proposed by petitioner (J. App. 237a).[4]

In its order issued October 18, 1954, granting Oklahoma Natural's intervention, the Commission addressed itself to Oklahoma Natural's motion and other pleadings attacking petitioner's proposed rate (J. App. 300a-303a). By this order the Commission gave express notice to petitioner and all parties that the 12¢ rate proposed by petitioner was an issue to be determined after hearing on the certificate application (J. App. 302a).

Lone Star Gas Company (Lone Star) thereafter also filed a petition for leave to intervene at Docket No. G-2570 (J. App. 289a-299a), a copy of which was served on petitioner. Lone Star stated the manner in which it would be aggrieved by an increase in the area price of natural gas from 10¢ to 12¢ per Mcf, and spelled out the impact of such a price increase upon

[4] On the same day Oklahoma Natural filed a "Protest and Motion for Rejection of Proposed Rate Schedule" (J. App. 500a-502a), with service to petitioner, protesting against the rate schedule providing for the 12¢ rate. A few days later Oklahoma Natural filed an "Application for Rehearing or Modification" (J. App. 257a-277a), with service to petitioner, requesting that the temporary authorization to petitioner be revoked or modified as to the 12¢ rate. It also filed a "Supplement to Protest and Motion for Rejection of Proposed Rate Schedule" (J. App. 503a-504a), with service to petitioner, again attacking the rate.

the hundreds of thousands of ultimate consumers it serves. This petition specifically requested "that any certificate issued in these proceedings be continued so as to require Signal to file an initial rate schedule which does not exceed the current price paid in the area" (J. App. 299a). The Commission granted Lone Star's intervention (J. App. 307a-308a).

Both Lone Star and Oklahoma Natural participated actively in the Commission's hearing on petitioner's application for a certificate under § 7(c) of the Act, adducing voluminous evidence showing that the 12¢ price would be contrary to the public convenience and necessity (J. App. 98a-141a).

The record shows that Oklahoma Natural is engaged in the local distribution of natural gas in the State of Oklahoma, serving some 320,000 customers, and that Lone Star is a natural gas company subject to the jurisdiction of the Commission and is engaged in the transportation and local distribution of natural gas to more than 650,000 customers in the States of Texas and Oklahoma. The record shows that the highest price paid for natural gas in the area of petitioner's sale is 10¢—2¢ less than the price proposed by petitioner. The record shows further that if the sale by petitioner were permitted at the price proposed, the inevitable result would be that the price of gas in the area, including gas purchased by Oklahoma Natural and Lone Star, would be driven upward to 12¢, thereby increasing the cost of gas to the customers of Oklahoma Natural and Lone Star by approximately $3,140,000 annually, and the cost of gas to Cities Service's customers by $1,000,000 annually (J. App. 130a, 440a-442a). The Commission held that on the evidence petitioner could be granted a certificate only upon

a condition that it file a rate schedule providing for a rate of 10¢ (J. App. 440a-455a; 494a-499a).

Petitioner filed a petition to review the Commission's decision in the United States Court of Appeals for the Third Circuit under § 19(b) of the Act. Oklahoma Natural and Lone Star were permitted to intervene in support of the Commission's decision.

DECISION OF THE COURT OF APPEALS

The court below held that the authority of the Commission under § 7(e) to impose the rate condition is clear from the language of the section, is supported by the legislative history, and that such rate condition is consistent with the Commission's practice over a number of years. It held further that the Commission's specific authority to condition under § 7(e) permits the setting of a particular rate and that substantial evidence supports the Commission's finding that public convenience and necessity require the certificate to be conditioned on a 10¢ rate.

ARGUMENT

This proceeding involves action by the Commission under the authority of §§ 7(c) and (e) of the Act. The Commission held a hearing on petitioner's application for a certificate under these provisions and, on the evidence, concluded that the public convenience and necessity required issuance of the authorization requested only if the proposed price were reduced to 10¢ per Mcf. Sections 7(c) and (e) are the only sections of the Act providing for the certificate regulation of proposed services and sales subject to the Commission's jurisdiction. The procedure followed

and decision reached were in full compliance with § 7's governing statutory provisions.

Petitioner does not contend that the Commission's findings were not supported by substantial evidence or that the court below erred in so holding. Nor does petitioner contend that the condition was not required by the public convenience and necessity. It argues only that the Commission may not legally attach the condition in question because § 5(a) prescribes procedures and standards for regulating rates in certain circumstances and that such procedures and standards must be adhered to where the Commission, under the authority of § 7(e), conditions certificate authorization upon a definite lower rate. Petitioner further argues that attachment of the rate condition under § 7 deprives petitioner of its property without due process of law since petitioner was given notice only of a proceeding under § 7.

There is no reference in § 7 of the Act to the provisions or authority contained in § 5, nor is there any reference in § 5 to the provisions and authority contained in § 7.

1. Commission Action Fully Authorized by § 7 and Properly Exercised

Section 7(e) of the Act provides clear authority for the Commission's attachment of the condition to the certificate. That section provides that the Commission shall issue a certificate authorizing a sale of gas:

> "* * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules,

> and regulations of the Commission thereunder, and that the proposed service, sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * * ."

The same section grants express authority to condition certificates as follows:

> "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Under the command of § 7(e) the Commission shall deny a certificate not found to be required by the present or future public convenience and necessity. Where the Commission finds that the terms proposed for a sale for which authorization is sought are such that authorization is not required by the public convenience and necessity, it may, by the exercise of its power to condition the certificate, grant authorization on "such reasonable terms and conditions as the public convenience and necessity may require". It did that in the instant case.

There can be no question that the impact on the public of rates proposed by an applicant is a matter which the Commission may consider in determining "public convenience and necessity". This Court has repeatedly held that the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610, 612 (1944); *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 581 (1949). In

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954), where this Court held a company such as petitioner to be a "natural-gas company" under the Act, it said, at 685:

> "Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act."

No single consideration in determining whether a proposed sale will serve public convenience and necessity is more important than the impact of the rate structure. As the court below recognized (Pet. App. A, 4a-5a, n. 3), Congress intended that such matters be considered at the outset in connection with the issuance of the certificate "at a time when such vital matters can readily be modified as the public interest may demand".[5]

The Commission on substantial evidence found that the granting of the certificate at the price proposed in the application would be contrary to the public interest and concluded as follows (J. App. 452a):

> "In the face of admitted injury to many parties in this proceeding, we are convinced that a rate structure which has prevailed in this area for some time should not be disturbed without a showing more substantial than appears on this record that such a change is necessary and that the level to which the rates are proposed to be changed is itself just and reasonable. We find that the certificate applicants herein have failed to demonstrate that a rate level of 12 cents per Mcf is necessary in the public interest or that the public convenience and necessity which requires the issuance of this certificate dictates a finding

[5] H. Rept. No. 1290, 77th Cong., 1st Sess., pp. 2-3 (1941).

> that a rate of 12 cents is necessary to ensure the economic feasibility of the project."

Thus to protect the public interest, the certificate was conditioned as follows (J. App. 455a):

> "The certificate granted in paragraph (B) hereof shall be granted upon the express condition and requirement that Signal file a rate schedule with the Commission within 30 days from the date of issuance of this order providing for a rate of ten (10) cents per Mcf in lieu of its proposed rate of 12 cents per Mcf for natural gas delivered and sold Cities Service from the Fox Gasoline Plant; otherwise the order in this proceeding shall be null and void in its entirety."

In response to petitioner's suggestion that the Commission might later take action concerning petitioner's rates under § 5 and should therefore issue the certificate without a rate condition, the Commission found that damage to the public could be prevented only by imposition of the condition (J. App. 450a-453a). It stated "our action designedly is an interim measure calculated best to protect the public interest in a timely manner" (J. App. 451a).

2. Legislative History Comfirms Power to Attach Rate Conditions

There is no ambiguity in the broad grant of authority to the Commission and the inclusion of rate conditions is within the scope of such authority. If there were any doubt that the conditioning authority includes conditions as to rates, it would be dispelled by the legislative history of § 7. Section 7(e) was added by amendment to the Act in 1942. The House Com-

mittee on Interstate and Foreign Commerce in favorably reporting the amendment said:[6]

> "By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand."[7]

The Senate Committee on Interstate and Foreign Commerce likewise reported the bill favorably, indicating that it would give the Commission certificate power "which it should have and should exercise in the public interest" respecting, among other things, "the characteristics of the rate structure".[8]

At the hearings before the House it was made clear to the Committee that § 7(e) authority to condition was intended to include authority to attach rate conditions.[9]

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[6] H. Rept. No. 1290, 77th Cong., 1st Sess., pp. 2-3 (1941).

[7] Petitioner is a "natural-gas company" under the Act and subject to its provisions as any other natural gas company whether an interstate pipeline transporter or an independent producer selling in interstate commerce. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[8] S. Rept. No. 948, 77th Cong., 2d Sess., pp. 1-2 (1942).

[9] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 23-24 (1941).

In commenting on the bill[10] which eventually became the 1942 amendment to the Act and which included the express authority to condition, the Commission said:[11]

> "The proposed bill in all its provisions seems well adapted to accomplish the avowed purpose of vesting in the Federal Power Commission complete regulatory control through the instrumentality of the certificate of public convenience and necessity over the transportation and sale of natural gas and all extensions and new construction of pipe lines and other facilities by natural-gas companies."

As reported by the House Committee, the bill was passed by the House and Senate without amendment.

At the time § 7(e) was enacted granting specific authority to condition certificates, §§ 4 and 5 relating to rates were part of the Act. Nevertheless no problem was envisaged in granting the certificate authority to include rate conditions.

Congress in meticulously providing the procedure and standard to be followed in § 7(e) carved out no exception and included no requirement that the different procedure and standard of another section were to be followed in determining the effect of the rate structure on the public convenience and necessity. This it could easily have done and cannot be said to have been overlooked since consideration was given to the authority under § 7(e) to condition as to rates.[12]

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[10] H.R. 5249, 77th Cong., 1st Sess. (1941).

[11] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., p. 82 (1941).

[12] See *supra*, p. 11, n. 9.

Petitioner attempts to draw a distinction between rate conditions which prescribe a "definite and specific rate", and other types of rate conditions. It argues that the Commission has not previously attached exactly the same condition in other certificates and therefore may not now do so (Pet. 15). This is specious reasoning. In view of the specific statutory authority to attach "such reasonable terms and conditions as the public convenience and necessity may require", the presence or absence of precedent for a particular type of condition is wholly immaterial. Obviously, the necessity for attachment of any given condition must depend upon the requirements of public convenience and necessity under the circumstances of a particular case presented to the Commission for decision. As the circumstances of cases vary, so also will the nature of the conditions required. Moreover, attachment of conditions imposing a definite and specific rate ceiling is not without precedent in Commission experience. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494 (C.A. 3, 1953); *Arkansas Louisiana Gas Co.* v. *Federal Power Commission,* 113 F. 2d 281 (C.A. 5, 1940).

Petitioner would attribute to Congress an intent to grant to the Commission an impotent power under §7(c) to "in its discretion, scrutinize the characteristics of the rate structure of an interstate gas pipeline certificate applicant in passing upon its certificate application", without the power to act as a result of its scrutiny (Pet. 12-13). Petitioner says that "the power to scrutinize is not equivalent to the power to modify and fix rates" (Pet. 13). But the Commission, by attaching the condition that a 10¢ rate be filed did no more than was stated in the House Committee

Report[13] to be the purpose of the scrutiny, *i.e.*, to modify the rate structure "at a time when such vital matters can readily be *modified* as the public interest may demand" (emphasis supplied).

The Commission, by conditioning the certificate so as to hold the rate to a level required by the public interest, has not required the filing of a modified rate. It has simply exercised its discretion as required by the public interest to prevent a proposed rate from becoming effective. While petitioner may now make the sale, if it so desires, at the 10¢ rate found to be compatible with the public interest, the Commission order does not *require* petitioner to sell at such rate, or at any other rate. Petitioner is at liberty to elect not to render the service as authorized.

3. Commission, With Judicial Approval, Has Routinely Exercised Its § 7(e) Authority to Impose Rate Conditions in Certificate Orders

The Commission's annual reports present abundant statistical evidence of its long-established practice of attaching rate conditions to § 7 certificate orders.[14] While such rate conditions have been cast in a variety of forms,[15] the requirements of public convenience and necessity form a common denominator for all.

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[13] *Supra*, p. 11.

[14] Twenty-ninth Annual Report (1949), pp. 114-119; Thirtieth Annual Report (1950), pp. 115-116; Thirty-first Annual Report (1951), pp. 109-110; Thirty-second Annual Report (1952), pp. 110-111; Thirty-fourth Annual Report (1954), pp. 127-128; Thirty-fifth Annual Report (1955), pp. 135-137; Thirty-sixth Annual Report (1956), p. 88.

[15] See, *e.g.*, *Re Tennessee Gas Transmission Co., et al.*, 9 F.P.C. 271, 291, 295-296 (1950); *Re Colorado Interstate Gas Co., et al.*, 10 F.P.C. 778, 780 (1951); *Re Trunkline Gas Supply Co.*, 8 F.P.C.

It is significant that the Commission's use of rate conditions in § 7 proceedings pre-dates the 1942 amendment which added subsection (e) thereof. *Supra,* n. 10.

One year after the 1938 enactment of the Natural Gas Act, in issuing a certificate to a natural gas company, the Commission imposed the condition that any new service undertaken by applicant "during the life of this certificate" must be rendered at the rate approved in such order. *Re Louisiana-Nevada Transit Co.,* 2 F.P.C. 546, 549 (1939). Upon review, the Court of Appeals affirmed: *Arkansas Louisiana Gas Co.* v. *Federal Power Commission,* 113 F. 2d 281 (C.A. 5, 1940). Although basing its decision upon other grounds, the court answered Arkansas Louisiana's contention that it was beyond the power of the Commission to impose rate conditions, saying (113 F. 2d at 283): "[W]e find nothing in the statute which prevents the commission from imposing in the interest of the public to be served by the [applicant], reasonable conditions upon the granting of a certificate * * *." This decision and the rate condition involved were cited in the House hearing as an example of the authority to condition which would be specifically authorized by the amendment.[16]

Since the 1942 amendment, rate conditions in certificate orders have been uniformly upheld in the limited number of cases presenting this issue to the courts.

250, 257, 260 (1949), 9 F.P.C. 721, 729-730, 739, 741 (1950), 10 F.P.C. 185, 188-189, 207-208 (1951), 10 F.P.C. 1395, 1396 (1951); *Re Michigan-Wisconsin Pipe Line Co.,* 5 F.P.C. 953, 955 (1946), 6 F.P.C. 1, 20 (1947), aff'd. *sub nom., Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881 (C.A.D.C., 1948), *cert. den.,* 335 U.S. 854 (1948).

[16] See hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, pp. 23-25.

The court below took note of this fact (Pet. App. A, 5a, n. 4), and quite properly rejected any restriction of the Commission's § 7(e) conditioning authority on the basis of an alleged distinction either between the status of independent producers and that of pipeline companies, or between particular types of rate conditions (Pet. App. A, 6a).

Until the decision in the *Phillips* case, *supra*, n. 7, the Commission had not regulated independent producers, such as petitioner. Petitioner's application was filed less than three months thereafter and, consequently, was among the first applications filed by a producer-seller to be considered by the Commission. Thus, the fact that, prior to the *Phillips* decision, rate conditions had been attached only to certificates issued to pipeline companies is of no legal significance.

4. No Conflict Between §§ 7 and 5

Section 5(a) of the Act provides procedures for the Commission to follow when it investigates any rate "demanded, observed, charged or collected" for the purpose of determining whether it is unjust, unreasonable, unduly discriminatory or preferential. Thus, it deals with sales which have been authorized and rates being charged, not those proposed.[17] Until authorized by a certificate under § 7, no sale may be made and

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[17] The Commission pointed out the difference in criteria between §§ 5 and 7 as follows (J. App. 497a).

> "We do not hold that the issue of rates in a certificate proceeding is identical in scope and effect with that in a Section 4 and Section 5 proceeding. The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate."

therefore no rate may be "demanded, observed, charged or collected".

After the certificate is issued and complied with, any question arising as to the rate will be resolved in accordance with the provisions of §§ 4 and 5. Section 5(a) governs investigations of rates being charged, initiated either by the Commission on its own motion or upon complaint to it by an interested party; § 4 governs changes in effective rates upon the initiation of the natural gas company charging such rate.

If the Commission were to grant every certificate under § 7 without rate condition, however excessive the price and whatever the impact on the public, and depend upon later investigation and action under § 5(a), no protection from the impact of excessive rates would be possible in the interim.[18] Investigations by the Commission under § 5(a) are long and hearings protracted. As stated by the Commission (J. App. 450a-451a):

> "A proceeding under Section 5(a), moreover, is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period. A proceeding under Section 5(a) is, itself, more time consuming than the course of action we employ here, thus administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance."

On the other hand, if the Commission under § 7 proceedings were required to investigate and determine the just and reasonable rate as a prerequisite to a rate

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[18] The Commission has no authority to grant reparations.

condition, as suggested by petitioner, it would be required to shoulder a burden which belongs to the applicant. Under §§ 7(c) and (e) *applicant* is the moving party and as such has the burden of proving that the sale as proposed is required by the public convenience and necessity.[19] Petitioner seeks to invoke the § 5(a) provisions which would not only apply a different standard, *i.e.*, whether the proposed rate is just and reasonable, but would place the burden on the Commission or a complainant to prove that proposed rates are unjust or unreasonable.

In attaching the rate condition in the case here under review, the Commission found that the damage to the public interest would have already taken place if the Commission were to permit the rate proposed by petitioner to go into effect without condition and later initiate a rate investigation proceeding under § 5(a) (J. App. 450a-453a). At the same time the Commission specifically pointed out that its action did not "foreclose Signal from filing any changes in its rate structure which it may feel necessary and which it is able to support" (J. App. 452a).

Interim protection to the public is afforded by the attachment of a condition to the certificate allowing initially only a rate required by the public convenience and necessity. Protection to the public after the initial rates become legally effective is afforded under the provisions of § 5(a) authorizing the investigation and determination of just and reasonable rates by the

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[19] As stated by the Commission (J. App. 448a): "In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public convenience and necessity. A vital element of such proof is concerned with the rates proposed."

Commission and under § 4 which permits an applicant to obtain an increase when justified. Thus the sections harmonize. There is no "possibility of conflict" (Pet. 12) between §§ 7 and 5, and effective regulation in the public interest is provided.

Petitioner suggests that the purchaser, Cities Service, might not be willing to amend the contract to permit petitioner to file the lower rate in compliance with the condition (Pet. 18).[20] Significantly, petitioner has refrained from any inquiry to Cities Service on this point. If any such amendment to the contract were necessary, undoubtedly the purchaser would agree since its witness testified that it had originally offered petitioner 8¢, then 10¢, but had been obliged to go to 12¢ to buy the gas (J. App. 2a).

Rather than "eliminate the possibility of conflict between these two separate and distinct regulatory functions of the Commission", as suggested by petitioner (Pet. 12), imposition of § 5(a) standards and procedures in § 7(e) cases would bring about confusion and conflict and prevent timely action by the Commission in the public interest.

5. No Question of Due Process

Based on the assumption that the Commission was required to follow the § 5(a) provisions, petitioner contends that it was deprived of its property without

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[20] Petitioner cites *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) as holding that petitioner may not unilaterally effect a change in "rate". That case involved a proceeding under § 4 of the Act and a rate which had been in effect for years. The Commission's action here under § 7 does not involve a charged rate and does not require any involuntary action by the parties to the contract. They may engage in the sale if they desire to do so on a condition required by the public convenience and necessity. *Supra*, p. 14.

due process of law. It says the Commission gave notice only of a proceeding under § 7, and no notice of a § 5 proceeding (Pet. 21-26).

As shown above, § 5 provisions are not applicable and this contention must be rejected. Petitioner concedes that "the certificate provisions of Sections 7(c) and (e) are not related to any vested or property right of an applicant but instead involve an exercise of discretion by the Commission concerning the ability and willingness of the applicant to perform, as well as matters of public policy and public interest" (Pet. 11). Petitioner has no vested or property right to either a certificate or to a particular rate prior to Commission authorization under § 7. Thereafter petitioner is entitled to such rate as it may justify under the provisions of the Act then applicable.

Since the proceeding was a § 7 proceeding, and the requirements of § 5(a) were not controlling, petitioner received full and adequate notice when informed that a hearing would be held pursuant to § 7 with respect to petitioner's certificate application (J. App. 246a). Additionally, petitioner was informed that Oklahoma Natural and Lone Star were permitted to intervene in opposition to the rate (J. App. 300a-303a, 307a-308a). Furthermore, as heretofore shown, *supra,* pp. 3-5, petitioner was served with numerous pleadings filed by Oklahoma Natural and Lone Star which raised the issue whether the public convenience and necessity would permit certification of petitioner's sale at the rate proposed,[21] and those parties adduced voluminous

[21] Petitioner's contention that it lacked notice of the rate issues is made in face of the fact that it was served with Oklahoma Natural's and Lone Star's petitions to intervene and filed answers to such petitions and other pleadings raising the rate issue (J. App. 249a-256a, 278a-285a, 303a-306a).

evidence at the hearing which showed that the public convenience and necessity did not require issuance of the certificate unless conditioned to require the initial filing of a rate lower than that proposed.

Petitioner quotes from *Morgan* v. *U. S.*, 304 U.S. 1 (1938), to the effect that "[t]hose who are brought into contest with the Government" are entitled to be advised and heard on what the Government proposes before the Government issues its final command (Pet. 19-20). But language immediately preceding that quoted by petitioner covers the situation in this case (304 U.S. at 18):

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

The opposing parties in this proceeding were the interveners. All parties were entitled to a "fair and full hearing" as required by the *Morgan* case. The Commission was required to consider the evidence and opposition of Lone Star and Oklahoma Natural, as well as petitioner's case. Its obligation was to see that petitioner had notice of the claims of Lone Star and Oklahoma Natural and opportunity to meet them. This it did.

Where a proceeding is not initiated by the Government, as it was in the *Morgan* case, but rather by an applicant, as here, and numerous parties intervene raising issues in opposition, no party may be given notice in advance by the deciding body as to what action it proposes to take on issues thus raised since the Commission may act only upon the record after hearing as provided in §7(c).

Petitioner admits that it was fully advised of the issues raised by Oklahoma Natural and Lone Star (Pet. 20-22). It had full opportunity to demonstrate that the issuance of the certificate at the increased rate proposed would be required by the public convenience and necessity. This petitioner failed to do and it cannot now claim that it was not advised of the issues or that it did not have a full opportunity to be heard thereon.

CONCLUSION

There is no reason why this petition should be granted. There is no conflict between circuits, nor is there conflict with decisions of this Court. The Commission action complies with the applicable law and is consistent with the purpose of the Act to protect the public interest.

The petition for *certiorari* should therefore be denied.

Respectfully submitted,

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